Nos. 87-1943 and 87-1956

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In the Supreme Court of the United States

OCTOBER TERM, 1988

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE FEDERAL PARTIES

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QUESTION PRESENTED

Section 1302 para. 5 of Title 18 makes it a crime knowingly to mail "any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance," or "any list of the prizes drawn or awarded" by means of any such lottery or similar enterprise. The question is whether the advertisement and prize list clauses in Section 1302 are invalid under the First Amendment.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the United States Postal Service and the United States of America were named as defendants in the district court. They are appellants in this Court in No. 87-1956 and appellees in No. 87-1943.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-20a)[1] is reported at 677 F. Supp. 1400.

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[1] Unless otherwise noted, J.S. App. refers to the jurisdictional statement appendix in No. 87-1956.

JURISDICTION

The judgment of the district court (J.S. App. 21a-22a) was entered on January 6, 1988. A notice of appeal (J.S. App. 23a-24a) was filed on January 28, 1988. On March 17, 1988, Justice Blackmun extended the time within which to docket the appeal to and including May 27, 1988, and the appeal was docketed on that date. A notice of appeal was filed in No. 87-1943 on January 29, 1988 (87-1943 J.S. App. 21a). On March 21 and April 6, 1988, Justice Blackmun entered orders extending the time within which to docket the appeal in No. 87-1943 to and including May 28, 1988, and the appeal was docketed on May 27, 1988. This Court noted probable jurisdiction in both cases on October 3, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

A. Historical And Statutory Background

1. Lotteries have an ancient pedigree.[2] In England and during the early history of this nation, lotteries were a popular and respectable activity.[3] Beginning in the Jacksonian period, however, lotteries fell into disfavor

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[2] The first king of Israel was chosen by lot. 1 *Samuel* 10:20-21.

[3] See generally Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978); J. Ezell, *Fortune's Merry Wheel* 1-59 (1960); A. Spofford, *Lotteries In American History*, S. Misc. Doc. 57, 52d Cong., 2d Sess. 174-195 (1893); National Inst. of L. Enforcement & Crim. Just., LEAA, U.S. Dep't of Justice, *The Development of the Law of Gambling: 1776-1976*, at 500-519 (1977) [hereinafter *Gambling*]; G. Sullivan, *By Chance a Winner: The History of Lotteries* (1972); D. Weinstein & L. Deitch, *The Impact of Legalized Gambling: The Socioeconomic Consequences of Lotteries and Off-Track Betting* 8-9 (1974).

for a variety of reasons, including "animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the poor upon whom the burden of the lottery system was thought to fall." [4] In fact, the dominant nineteenth century view was that lotteries were harmful to society.[5] The states therefore began to restrict or prohibit both private and state-run lotteries.

A major obstacle to the states' reform effort was their inability to regulate lotteries that operated across state lines. Because they lacked authority to prosecute lotteries conducted in another jurisdiction, or to regulate the use of the mails to distribute lottery tickets and advertisements, the states were forced to attack lotteries within their borders "at the consumer level—a difficult, expensive, and unpopular task." [6] The states therefore turned to Congress for assistance.

2. Congressional restrictions on the use of the postal service in connection with lotteries date from 1827. In that year, Congress prohibited postmasters from serving as lottery agents and from receiving "lottery schemes, circulars, or tickets" free of postage. Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238. Forty-one years later, Congress made it a crime to deposit in the mails "any letters

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[4] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 927.

[5] See, *e.g.*, *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 168 (1850), and *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1879), both quoted at pages 33-34, *infra*; *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321, 355 (1903) ("When enacting [the lineal predecessor to 18 U.S.C. 1301] Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court."); J. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, H.R. Misc. Doc. 210, 53d Cong., 2d Sess. Pt. 9, at 81 (1898) (Special Message to the Senate and House of Representatives from President Harrison) ("It is not necessary, I am sure, for me to attempt to portray the robbery of the poor and the widespread corruption of public and private morals which are the necessary incidents of these lottery schemes.").

[6] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 931.

or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. In 1872, Congress passed legislation prohibiting the mailing of letters or circulars concerning "illegal" lotteries. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. Four years later, Congress struck that limitation, thereby extending the prohibition to all lotteries, including those chartered by state legislatures. Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)). See *Horner* v. *United States*, 147 U.S. 449, 456, 466 (1893); *United States* v. *Noelke*, 1 F. 426, 428-429 (C.C.S.D.N.Y. 1880); *Lottery Circulars*, 15 Op. Att'y Gen. 203, 203-204 (1877).

The 1876 Act was soon challenged on the ground that it violated the First Amendment. This Court rejected that claim in *Ex parte Jackson*, 96 U.S. 727 (1877), which involved a prosecution for depositing in the mails a letter that contained a circular offering prizes in a lottery. The Court explained that "the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." *Id.* at 736. Analogizing the 1876 Act to a similar 1873 law prohibiting the use of the mails to distribute obscene materials, the Court found that "[t]he same inhibition has been extended to circulars concerning lotteries, —institutions which are supposed to have a demoralizing influence upon the people." *Ibid.* And the Court concluded that "we have no doubt" that it was lawful for Congress to do so. *Id.* at 737.

The 1876 Act was nonetheless widely viewed as an ineffective weapon against lotteries. Its chief inadequacy was that it did not to apply to lottery advertisements contained in newspapers.[7] That shortcoming made the

[7] Lotteries often used newspaper advertisements to promote their games, since newspapers enjoyed second-class mailing privileges and

Act particularly ineffective against the powerful Louisiana Lottery, the only lottery still operating legally in 1890 when the predecessor to the statute at issue in this case was enacted.[8] The Louisiana Lottery operated nationwide and used the mails as its principal means of obtaining revenues from the public in other states,[9] deriving more than 90% of its multi-million dollar income from out-of-state bettors.[10] Because the Attorney General had concluded that the 1876 Act did not apply to newspapers,[11] however, that law did not prevent the

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were less expensive to distribute than letters containing lottery circulars, which would have been treated as first-class material. 21 Cong. Rec. 8714 (1890) (Rep. Evans); see the Classification Act of 1879, ch. 180, §§ 7 & 10, 20 Stat. 358, 359.

[8] *Exclusion of Lotteries from Postal Facilities*, 17 Op. Att'y Gen. 77, 77 (1881); see 21 Cong. Rec. 8714-8717 (1890) (summary of state laws prohibiting lotteries). The Louisiana Lottery was chartered in 1868 ostensibly to raise funds for Charity Hospital in New Orleans. In fact, however, the lottery was directed by a New York gambling syndicate, which had bribed Reconstruction Era state legislators in order to obtain a charter granting the lottery a monopoly position within the state. H. Asbury, *Sucker's Progress* 85 (1938); J. Ezell, *supra*, at 242-244; G. Sullivan, *By Chance a Winner: The History of Lotteries* 52-56 (1972).

[9] *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, 46th Cong., 2d Sess. 16 (1880) (Letter from Postmaster-General Key to the House of Representatives); *id.* at 27-28 (Letter from New York City Post Office General Superintendent Forrester to New York City Postmaster James (Oct. 14, 1879)); *id.* at 28 (Letter from New Orleans Postmaster McMillen to Assistant Attorney General Freeman (Nov. 4, 1879)); *id.* at 28-29 (Letter from New Orleans Postmaster McMillen to Postmaster-General Key (Nov. 12, 1879)); 21 Cong. Rec. 8706 (1890); *id.* at 8711 (statement of Rep. Wilkinson); *id.* at 8717 (statement of Rep. Hitt); *id.* at 8721 (statement of Rep. Price); J. Ezell, *supra*, at 251.

[10] 21 Cong. Rec. 8706 (1890) (Rep. Moore); J. Ezell, *supra*, at 251; D. Weinstein & L. Deitch, *supra*, at 11.

[11] *Lotteries—Non-Mailable Matter*, 18 Op. Att'y Gen. 306, 309 (1885). The Attorney General concluded that a newspaper did not become a "circular" by publishing an advertisement. *Ibid.*

Louisiana Lottery from soliciting customers through newspaper advertising or other promotional devices.[12]

3. For several years, Congress considered the question whether the 1876 Act should be amended to include newspapers in order to curtail the nationwide operation of the Louisiana Lottery.[13] During that period, there was considerable debate on the question whether applying the 1876 Act to newspapers would violate the First Amendment. Supporters of the amendment argued that it was constitutional under this Court's decision in *Ex parte Jackson*[14] and noted that newspapers generally did not oppose extending the 1876 Act to include their publications.[15] Opponents claimed that *Ex parte Jackson* did not sanction the exclusion of newspapers from the mails, and that excluding newspapers from the mails because they published lottery advertisements would establish a precedent that in the future could be used to exclude from the mails commentary that other Congresses found detrimental to the public.[16] Supporters of the amendment ul-

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[12] Examples of contemporary advertisements and prize lists are found in Appendix B to this brief and at various pages in G. Sullivan, *supra*. See also *United States* v. *Noelke*, 1 F. at 428-429 (describing a similar advertisement).

[13] See generally J. Ezell, *supra*, at 251-263; *Gambling* 513-518; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 937-940.

[14] See S. Rep. 1579, 51st Cong., 1st Sess. (1890); S. Rep. 233, 48th Cong., 1st Sess. 1 (1884); S. Rep. 11, 49th Cong., 1st Sess. 12 (1886); H.R. Rep. 2678, 49th Cong., 1st Sess. 1 (1886); H.R. Rep. 787, 50th Cong., 1st Sess. Pt. 2, at 2-4 (1888) (Views of the Minority); 21 Cong. Rec. 8710 (1890) (Rep. Caldwell); *id.* at 8712 (Rep. Wilkinson).

[15] See S. Rep. 1579, *supra*, at 3 ("Many of the ablest and most influential journals now advocate the denial of mail facilities of any publisher who will admit a lottery advertisement to his columns, and it is believed that an enactment by Congress to this effect will meet with the almost unanimous approval of papers of known standing and ability.").

[16] See S. Rep. 233, *supra*, at 13-15 (Views of the Minority); H.R. Rep. 826, 48th Cong., 1st Sess. 2-4 (1884); H.R. Rep. 2678, *supra*, at 4-6 (Views of the Minority); H.R. Rep. 787, *supra*, at 1.

timately carried the day, and the Fifty-First Congress enacted the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (codified at Rev. Stat. § 3894 (Supp. 2d ed. 1891)), the lineal predecessor to the statute at issue in this case. In order to deny the Louisiana Lottery the use of the mails to attract customers, the Act outlawed the mailing of "any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing."

It was not long before the constitutionality of the new statute was also challenged, and in *In re Rapier*, 143 U.S. 110 (1892), this Court upheld the extension of the prohibition on mailing lottery advertisements and prize lists to newspapers. In that case, two defendants were convicted under the Act for mailing a newspaper containing an advertisement and a circular about the Louisiana Lottery. Relying on *Ex parte Jackson*, *supra*, this Court rejected the claim that the Act violated the First Amendment. As the Court explained (143 U.S. at 134-135):

> The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of maters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

Accord *Horner* v. *United States (No. 1)*, 143 U.S. 207, 213 (1892); *Horner* v. *United States (No. 2)*, 143 U.S. 570, 578 (1892) (both relying on *In re Rapier*).

Although the Louisiana Lottery ceased its operations in that state in 1893,[17] it set up new headquarters in Honduras and used a Florida express company for communications.[18] When Congress realized that the Louisiana Lottery had not yet been shut down, it passed the Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (codified as revised at 18 U.S.C. 1301), which made it a crime to transport lottery tickets in interstate commerce. The constitutionality of that Act was also challenged, and this Court once again upheld the statute in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903), this time over a claim that the Act exceeded Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3.

4. Congress has re-examined this regulatory scheme on several occasions in recent years. In 1975, following the rebirth of state-run lotteries in New Hampshire, New Jersey, and New York, Congress excluded from the scope of Section 1302 advertisements and prize lists in a newspaper published in a state which has a state-conducted lottery. 18 U.S.C. 1307. And only this year, Congress enacted additional exemptions for lotteries that are not illegal under state law and are conducted by a charitable organization or by a commercial organization as an occasional and ancillary promotional activity. Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, § 2 (Nov. 7, 1988). See H.R. Rep. 100-557, 100th Cong., 2d Sess. Pt. 1, at 1 (1988); 134 Cong. Rec. S16317-S16319 (daily ed. Oct. 14, 1988); *id.*

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[17] Some observers have concluded that the Anti-Lottery Act of 1890 was instrumental in bringing about the demise of the Louisiana Lottery. J. Ezell, *supra*, at 263-264; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 940; see *Report of the Postmaster-General*, H.R. Exec. Doc. 1, 52d Cong., 1st Sess. Pt. 4, at 17 (1891).

[18] J. Ezell, *supra*, at 267-268; G. Sullivan, *supra*, at 58; D. Weinstein & L. Deitch, *supra*, at 12.

at H10445-H10446 (daily ed. Oct. 19, 1988). Those amendments do not take effect for 18 months, however, in order to give the states an opportunity to prohibit lotteries from operating or advertising. § 5; H.R. Rep. 100-557, *supra*, Pt. 1, at 3; 134 Cong. Rec. S16318 (daily ed. Oct. 14, 1988).[19] Congress also recently enacted the Indian Gaming Regulatory Act, Pub. L. No. 100-497 (Oct. 17, 1988). Section 21 of that law states that Section 1302 shall not apply to any gaming conducted by an Indian tribe pursuant to the Act.

Notwithstanding these exceptions, the basic prohibition originally enacted as the Anti-Lottery Act of 1890 survives as 18 U.S.C. 1302 para. 5. When applicable, that provision makes it a crime knowingly to mail "[a]ny newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance," or "any list of the prizes drawn or awarded" by means of any such

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[19] Even if the 1988 Act took effect immediately, it would not render this case moot, for several reasons. First, the district court's judgment held the prize list clause invalid in its entirety, and would therefore prevent the government from enforcing that provision of Section 1302 against an illegal numbers racket. The 1988 Act did not modify the terms or meaning of the prize list clause as it applies to such illegal lotteries. Second, the 1988 Act does not apply to non-exempt commercial lotteries, such as casinos, since those enterprises do not conduct lotteries simply as a "promotional activity" on a "clearly occasional and ancillary" basis, as Section 2(a) of the 1988 Act requires. See 134 Cong. Rec. S16318 (daily ed. Oct. 14, 1988) ("the committee wishes to make clear that no provision of [the bill] is intended to change current law as it applies to professional gambling activities"); *id.* at S16319 (same); *id.* at H3646 (daily ed. May 25, 1988) (House debate and passage of an amendment making clear that gambling casinos are not included within the new exemption). Finally, the 1988 amendments do not exempt lists of prizes awarded by state-run lotteries when published by a newspaper in a state that does not conduct such a lottery.

lottery or similar enterprise.[20] Under complementary provisions of the Postal Code, any material that is excluded from the mail under 18 U.S.C. 1302 is deemed to be "nonmailable" and subject to seizure. 39 U.S.C. 3001. Other provisions authorize the Postal Service to stop the delivery of lottery-related responses for, or the payment of money orders to, a person conducting a lottery, 39 U.S.C. (& Supp. IV) 3005; after an administrative proceeding, to return to a sender mail addressed to any person engaged in a lottery or scheme involving fraud or false representations, *ibid.*; and to sue in federal court and, on a showing of probable cause, obtain a preliminary injunction detaining the incoming mail of a person alleged to be engaged in a lottery or similar scheme, pending the conclusion of such administrative proceedings, 39 U.S.C. 3007.

B. Proceedings Below

Appellee Minnesota Newspaper Association, Inc., is an organization of general and special interest newspapers published in Minnesota. Appellee's members distribute a significant portion of their circulation through the mails. J.A. 3. Minnesota law allows non-profit charitable organizations to operate gaming activities for fund-raising purposes. J.S. App. 1a-2a. Appellee's members wanted to publish advertisements and news stories about such lotteries, but were afraid to do so because of uncertainty about the meaning of 18 U.S.C. 1302, and 39 U.S.C. (& Supp. IV) 3001 and 3005, and because of warnings they had received from local postal inspectors that they could be prosecuted for mailing lottery-related materials. J.S.

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[20] Related provisions of Title 18 include: Section 1301, which prohibits the importation or transportation of lottery tickets, advertisements, or lists of prizes; Section 1303, which prohibits any Postal Service officer or employee from acting as a lottery agent; Section 1304, which prohibits broadcasters from broadcasting lottery advertisements, prize lists, or information; Section 1305, which creates a special exemption for fishing contests; and Section 1306, which prohibits financial institutions from selling lottery tickets.

App. 2a-3a. Appellee therefore brought this action to challenge the constitutionality of those laws under the First Amendment and Due Process Clause.

The district court granted partial summary judgment in favor of each party. The court first held that lottery advertisements (including advertisements containing prize lists) are "commercial speech," and that the advertising restrictions in Section 1302 are valid under *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986). J.S. App. 7a-13a. Although the court found the advertisements that appellee's member newspapers sought to publish concerned lawful activity that is not inherently misleading (*id.* at 8a), the court ruled that the statutory restrictions are valid because they directly advance two substantial governmental interests: Congress's interest in preserving the states' power to prohibit or limit gambling within their borders, and Congress's interest in restricting the interstate growth of private lotteries in order to reduce the threat of organized criminal involvement in gambling. *Id.* at 8a-13a. The court also held that Section 1302 does not apply to general news reports or editorial commentary about lotteries. Those materials, the court held, can be distributed through the mails. J.S. App. 16a.

Nonetheless, the court concluded that the prize list clause of Section 1302 is unconstitutional. J.S. App. 13a-15a. The court recognized that a list of prize winners is an effective promotional device for a lottery, but ruled that such a list is not commercial speech unless it is part of an advertisement. *Id.* at 13a-14a. Because Section 1302 independently forbids the mailing of advertisements promoting lotteries, the court held that the prize list clause was designed to restrict the publication of prize lists in noncommercial speech and was invalid unless the restriction was narrowly tailored to serve a compelling governmental interest. *Id.* at 14a. Finding that the in-

terests promoted by Section 1302 were not compelling, the court held the prize list clause was unconstitutional, but could be severed from the remainder of the statute. *Id.* at 14a-15a, 16a. The court acknowledged that its holding was inconsistent with this Court's decision in *In re Rapier*, but concluded that the rationale of that decision had been superseded by this Court's more recent First Amendment decisions. J.S. App. 15a.[21]

The district court accordingly entered a judgment declaring, inter alia, that "the restrictions in 18 U.S.C. § 1302, and its implementing regulations, on the mailing of lists of prizes awarded from a lottery are unconstitutional." J.S. App. 20a. The court's judgment also permanently enjoined appellants "from further enforcement of the restrictions on prize lists." *Ibid.*; *id.* at 21a-22a.

SUMMARY OF ARGUMENT

1. The prize list clause in 18 U.S.C. 1302 applies only to prize lists that are commercial speech. The district court erred in equating advertisements and commercial speech since that equation is both overinclusive and underinclusive. Political commentary, which is not commercial speech, can be presented in an advertisement. On the other hand, a draft contract, which surely is commercial speech, does not resemble an advertisement. The correct analysis for determining whether such materials are commercial speech is to examine the subject matter of the expression (*i.e.*, whether it promotes or advances a commercial transaction); the relationship between the speaker, the subject matter, and his audience (*i.e.*, whether the speaker has a financial interest in the com-

[21] The court also rejected appellee's equal protection challenge to the advertising restriction of 18 U.S.C. 1302, on the ground that the distinctions complained of were rationally related to legitimate government interests. J.S. App. 17a-19a. Finally, the court ruled that 39 U.S.C. (& Supp. IV) 3001 and 3005 could not be applied to restrict the mailing of newspapers containing prize lists in news reports. J.S. App. 19a.

mercial transaction or in its promotion); and the form that the speech takes (*i.e.*, whether it is an advertisement), instead of relying on the last criterion alone.

The text, background, and purposes of the Anti-Lottery Act of 1890 show that the prize list clause was designed to reach only what would today be called commercial speech. The Act was passed to close the mails to the Louisiana Lottery, a large-scale gambling syndicate and the only legal lottery still operating in 1890. Prize lists and advertisements were sometimes separately distributed by lotteries, and the two clauses were designed to capture both types of promotional materials. This Court ruled in *Horner* v. *United States*, 147 U.S. 449 (1893), that the prize list clause covers such lists when distributed for commercial purposes. It was that type of expression that Congress sought to reach by the Act, not news stories. That construction of the Act also avoids the constitutional issues raised by the district court's interpretation of the prize list clause.

2. Because Section 1302 prohibits the mailing of only what would today be called commercial speech, it is constitutional under the standards this Court has announced for determining the permissible bounds of the regulation of commercial speech. The Act reasonably and directly promotes the same type of interests this Court found legitimate in *Posadas*. By limiting the commercial promotion of lotteries, the act protects the policies of those states that have forbidden private lotteries within their borders. And by restricting the growth of private lotteries, it also reduces the threat of organized criminal infiltration of gambling enterprises and makes it easier for states that permit lotteries to police that activity. The act therefore advances principles of federalism by assisting states that have determined that private lotteries are contrary to public policy to implement that judgment. Section 1302 directly furthers those interests, because it was reasonable for Congress to believe that

restricting the promotion of lotteries through the mails would reduce the consumer demand for that activity. Finally, the restrictions imposed by that act are no more extensive than necessary, because they are limited to commercial speech. In sum, the Act excludes from the mails only a narrow category of commercial speech that plays a direct and integral role in the conduct of an activity that Congress and the states may discourage or suppress due to its potentially injurious effect on the public.

ARGUMENT

THE RESTRICTIONS IN 18 U.S.C. 1302 ON THE USE OF THE MAILS TO PROMOTE LOTTERIES ARE A LAWFUL REGULATION OF COMMERCIAL SPEECH

There is a longstanding federal policy against the use of the mails to promote private lotteries. It is illegal to send tickets for private lotteries in interstate or foreign commerce, 18 U.S.C. 1301, or to distribute through the mails lottery tickets or publications containing advertisements about lotteries or lists of the prizes they award. 18 U.S.C. 1302. This Court upheld the constitutionality of this regulatory scheme nearly a century ago in three separate decisions. The Court twice rejected First Amendment challenges to the predecessor versions of Section 1302 in *Ex parte Jackson*, 96 U.S. 727 (1877), and *In re Rapier*, 143 U.S. 110 (1892), and the Court turned aside a Commerce Clause challenge to the predecessor to Section 1301 in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903).

The district court upheld against a First Amendment claim the clause in Section 1302 that prohibits the distribution through the mails of publications that contain lottery advertisements. The court held that the advertisement clause is a reasonable restriction on the use of

the mails to promote lotteries.[22] At the same time, however, the court struck down as facially unconstitutional the parallel clause in the law that prohibits the distribution through the mails of publications containing lists of prizes awarded by lotteries. The court ruled that the prize list clause was designed to and in fact would restrict the distribution through the mails of news reports about lotteries.[23] In our view, the court correctly upheld the advertisement clause, but erred by striking down the prize list clause, since it misinterpreted the scope of the latter. When properly construed, the prize list clause is a reasonable regulation of the commercial promotion of lotteries.

I. SECTION 1302 REGULATES THE DISTRIBUTION THROUGH THE MAILS OF COMMERCIAL SPEECH PROMOTING LOTTERIES

A. "Commercial Speech" Is Not Limited To Traditional Forms Of "Advertising" And Embraces Other Types Of Expression That Are Integrally Related To A Commercial Transaction

1. The threshold issue in this case is what type of speech Congress sought to regulate through 18 U.S.C. 1302, since not all forms of expression are entitled to equal constitutional protection. Speech that is obscene or libelous, for example, is not protected by the First Amendment. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). By contrast, political debate and com-

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[22] The United States District Court for the District of Columbia has also upheld the advertisements clause over a similar First Amendment challenge. *Aimes Publications, Inc.* v. *United States Postal Service*, Civ. No. 86-1434 (D.D.C. Feb. 23, 1988).

[23] Appellee did not urge the district court to read the prize list clause in that manner; it only expressed uncertainty about the scope of the act. Plaintiff's Memorandum in Response 13 (dated Sept. 9, 1987). The Minnesota Civil Liberties Union, appearing as amicus curiae, argued that the prize list clause was applicable to news stories. Amicus Minnesota Civil Liberties Union's Memorandum in Support of Plaintiff's Motion for Summary Judgment 7 (dated Aug. 28, 1987).

mentary on matters of public concern fall within the core idea of expression protected by the First Amendment, and the government may not prohibit such speech absent a compelling justification and a precise limitation on what is forbidden. *Meyer* v. *Grant*, No. 87-920 (June 6, 1988); *Boos* v. *Barry*, No. 86-803 (Mar. 22, 1988). What has come to be known as commercial speech falls between those boundaries.

Commercial speech is entitled to some protection due to its informational value in a free market economy. See *In re R.M.J.*, 455 U.S. 191, 200 n.11 (1982) ("The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising."); *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Nevertheless, the application of the First Amendment to commercial speech "has been recognized generally as a substantial extension of traditional free-speech doctrine which poses special problems not presented by other forms of protected speech." *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979). Commercial speech therefore occupies a "subordinate position in the scale of First Amendment values" (*Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)), and due recognition must be given to the various "commonsense" differences between commercial speech and commentary on matters of public concern. *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24.

The Court has explained that a commercial speaker ordinarily has extensive knowledge of his product and the market, and speech connected with commercial transactions is generally calculated rather than spontaneous. Commercial speech is therefore more easily verifiable than classic political commentary. Commercial speech is also more durable than political commentary, since it is the offspring of economic self-interest, and thus is less

likely to be unduly chilled by governmental regulation. It is also well settled that the government does not lose its power to regulate commercial activity it deems harmful to the public simply because speech is a component of that activity. *Friedman* v. *Rogers*, 440 U.S. at 10-11 n.9; *Ohralik*, 436 U.S. at 456; *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Regulation directed at the sale of goods and services could well be ineffectual if the government could not also regulate the speech used in the promotion of those transactions. Finally, because commercial speech occurs in areas traditionally subject to government regulation (such as labor relations), requiring parity of treatment between commercial speech and political speech could dilute the protection afforded the latter. See *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 505 & n.12 (1981) (plurality opinion); *Central Hudson*, 447 U.S. at 562-564 & nn.5-6; *Friedman* v. *Rogers*, 440 U.S. at 10 & n.9; *Virginia Pharmacy Bd.*, 425 U.S. at 771-772 & n.24; *id.* at 777-781 (Stewart, J., concurring); see *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 758-763 & n.5 (1985) (plurality opinion); cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, No. 86-270 (June 25, 1987), slip op. 11-18 & n.16.

2. The district court held that the constitutionality of the advertisement clause of 18 U.S.C. 1302 must be considered under the lower degree of protection appropriate for commercial speech. That ruling is correct, as shown below. Nonetheless, the district court held that the prize list clause of that statute is not limited to commercial speech. Because the statute contains separate clauses prohibiting the mailing of lottery advertisements and lists of prizes, and because a prize list contained in an advertisement would be independently covered by the advertisement clause, the court reasoned that the prize list clause must apply to noncommercial speech, such as news stories about lottery winners. J.S. App. 13a-14a. The

court therefore concluded that the prize list clause must be measured against the higher standard of review that is appropriate for noncommercial speech. *Id.* at 14a-15a.

The fatal flaw in the district court's reasoning is the unstated assumption that "commercial speech" is exactly coterminous with "advertising." Relying on that assumption, the court reasoned that a law directed at a specific type of expression (here, speech designed to promote a lottery) can be measured against the limited standard of protection afforded to commercial speech only if the targeted expression is contained in what would ordinarily be termed an "advertisement." That assumption, however, which underlies the district court's entire analysis of the prize list clause in Section 1302, is erroneous. Once that assumption is removed, it is evident that both the advertisement and prize list clauses are aimed at slightly different but closely related forms of commercial speech. The prize list clause is therefore valid for the same reasons that support the advertisement clause.

Most of the Court's commercial speech cases have involved expression that would ordinarily be called "advertising pure and simple." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). In those cases, the Court has always treated such forms of expression as commercial speech. At the same time, however, the Court has never equated commercial speech with advertisements, and with good reason. Any such equation would be both overinclusive and underinclusive. It would be overinclusive because advertisements are often used to promote political candidates or ideas, or to identify matters of public debate and concern. For example, the allegedly libelous advertisement in *New York Times Co.* v. *Sullivan*, 376 U.S 254, 266 (1964), was described by the Court as one that "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the

highest public interest and concern." That advertisement was clearly not regarded by the Court as a form of commercial speech, and it is easy to imagine similar examples. Equating advertising with commercial expression also would be underinclusive, since it would exclude certain types of expression that are not ordinarily characterized as advertising, but are integrally related to a commercial transaction. A proposed contract is one example, but there are others that also fit easily into this category, such as "the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees" (*Ohralik*, 436 U.S. at 456 (citations omitted)), labor picketing designed to encourage a secondary boycott (*NLRB* v. *Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980)), and efforts to persuade a private standard-setting organization to exclude a competitor's product. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, No. 87-157 (June 13, 1988). None of those types of expression is entitled to the same degree of protection as political dialogue and commentary.

Rather than formalistically limit commercial speech to advertising, this Court has identified "the core notion of commercial speech" (*Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983)) as those forms of speech that do "no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).[24] In determining

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[24] See also, *e.g.*, *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 340 (1986); *Youngs Drug Products Corp.*, 463 U.S. at 66; *In re R.M.J.*, 455 U.S. at 204 n.17; *Virginia Pharmacy Bd.*, 425 U.S. at 762; see *Central Hudson*, 447 U.S. at 561 (commercial speech is "related solely to the economic interests of the speaker and its audience"); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (commercial speech "inform[s] private economic decisions" and is "primarily concerned with providing information about the characteristics and costs of goods and services").

whether a particular form of expression is commercial speech, the Court has also considered such factors as whether the speech takes the form of a commercial advertisement, whether it refers to a specific product, whether the speaker is motivated by economic gain, and whether the activity promoted by the expression is itself constitutionally protected or may be forbidden due to its injurious effects. *Youngs Drug Products*, 463 U.S. at 66-67 & nn.13-14. See also *Pittsburgh Press*, 413 U.S. at 387-388 (looking to the format in which the speech appears). In a related context, the Court has explained that the determination whether speech involves a matter of public or private concern must focus on the "content, form, and context" of the expression "as revealed by the whole record." *Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion) (quoting *Connick* v. *Myers*, 461 U.S. 138, 147-148 (1983)).

Youngs Drug Products and *Dun & Bradstreet* illustrate the proper analysis. In *Youngs Drug Products*, the Court concluded that drugstore flyers consisting primarily of price and quantity information about prophylactics clearly were proposals to engage in commercial transactions and thus fit within the core notion of commercial speech. In addition, however, the firm's informational pamphlets, which not only described the firm's products, but also discussed family planning, veneral disease, and the use and advantages of prophylactics in preventing such disease, were also deemed to be commercial speech. The format of the pamphlets, their identification of the speaker's particular product, and the economic motivation underlying their publication all suggested that the pamphlets were properly considered commercial speech. 463 U.S. at 67-68.[25]

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[25] That was true even though the pamphlets discussed important social issues. "A company has the full panopoly of protections available to its direct comments on public issues," the Court explained, "so there is no reason for providing similar constitutional protection when such statements are made in the context of com-

Similarly, *Dun & Bradstreet* involved the question whether financial reports prepared by a private credit reporting agency about private firms were matters of public concern and therefore were entitled to the same measure of First Amendment protection afforded to such expression in libel actions. A plurality of this Court concluded that, although the expression at issue did not constitute economic or commercial speech, "many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well." 472 U.S. at 762 n.8. Relying upon the Court's commercial speech decisions, the plurality found that the credit reports did not involve matters of public concern, for several reasons: They communicated information of interest solely to the credit reporting agency and its specific business audience; they were distributed to a limited audience; like advertising, they were unlikely to be chilled by incidental state regulation, since they were created for profit; they were arguably more objectively verifiable than other forms of speech; and, finally, they

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mercial transactions." 463 U.S. at 68 (footnote omitted). See also *Central Hudson*, 447 U.S. at 562-563 n.5. Cf. *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) ("[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication").

Youngs Drug Products also stated that other factors might be relevant in a particular case. For example, the Court noted that expression might constitute commercial speech even if it only refers to a generic product, because a company with a large market share or a trade association might be able to a promote an item without reference to brand names. 463 U.S. at 66-67 n.13. Another consideration, the Court noted, is whether a publication advertised an activity that is itself protected by the First Amendment. *Id.* at 67 n.14. See *Posadas*, 478 U.S. at 345-346 (distinguishing *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977), and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), on the ground that in those cases "the underlying conduct was constitutionally protected and could not have been prohibited by the State"). Finally, *Youngs Drug Products* noted that expression could be commercial even if it did not have all of the characteristics that were present in that case. 463 U.S. at 66-67 n.13.

were likely to be influenced by market forces. *Id.* at 762-763.

Youngs Drug Products and *Dun & Bradstreet* suggest that the key elements of commercial speech are (a) its subject matter, *i.e.*, whether it promotes or advances an ordinary commercial transaction; (b) the relationship between the speaker, the subject matter, and his audience, *i.e.*, whether the speaker has a direct financial interest in either the transaction or its promotion; and to a lesser degree (c) its format, *i.e.*, whether the speech appears in a form traditionally regarded as commercial advertising. The first element limits the definition of commercial speech to speech about commercial products and services, and excludes speech about a constitutionally protected activity, since that expression draws additional value from the underlying activity. The second element, the financial interest of the speaker in the good or transaction, is critical, because, as this Court has noted, a party with a financial interest in a good or service (or in the promotion of that item) is likely to be able to verify the accuracy of the information he distributes and is less likely to be chilled by government regulation than is a financially disinterested commentator. Finally, although the question whether particular speech is commercial cannot be answered simply by determining whether it is formally called advertising, that factor is also relevant, because what would ordinarily be called an advertisement is often the vehicle for the distribution of commercial speech. The use of that format therefore counsels in favor of treating particular speech as commercial.

B. The Prize List Clause, Like The Advertisement Clause, Regulates Only The Use Of The Mails For The Commercial Promotion Of Lotteries

We submit that the prize list clause of Section 1302, when read in light of the text, background, and purposes of the Anti-Lottery Act of 1890, should be construed to apply only to prize lists that constitute commercial

speech. That is, the act should be read to apply only to prize lists that serve to promote or advance a lottery where the speaker either has a financial interest in the lottery itself or has been paid directly to promote it. When read in that manner, the prize list clause covers a form of speech different than advertisements, but nevertheless is still limited to what the Court has identified as commercial speech.

1. The text of the statute is fully consistent with this construction. To begin with, Section 1302 does not support the district court's fear that the prize list clause might apply to news stories or editorials about lotteries. News reports and commentary are not mentioned among the items to which the statute applies. Although such speech could conceivably contain a list of the prizes won in a lottery, Congress was concerned with a different type of expression. Three examples of the types of promotional materials distributed at the time the Anti-Lottery Act of 1890 was adopted are reprinted in an appendix to this brief. App., *infra*, 11a-14a. Those examples are significant for two reasons. First, they reveal that advertisements and prize lists were separately published during that period.[26] Second, these examples suggest that the reason Congress added a separate clause dealing with prize lists was to ensure that the Act applied to circulars and other promotional devices that would not necessarily be considered advertisements, but would contain a

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[26] Although the contemporaneous examples suggest that Congress was primarily concerned with the publication of lists of prizes to be awarded at future drawings of a lottery, the language of the statute is not so limited. Thus, we believe that the statute should be read as prohibiting the use of the mails to distribute lists of prizes previously awarded in a lottery as well as lists of future prizes. Indeed, if the statute were limited to lists of future prizes, it would be relatively easy to evade its terms by publishing lists of past prizes and indicating that similar prizes would be awarded in the future.

list of what a bettor could win.[27] In sum, these promotional materials demonstrate that the advertisement and prize list clauses were designed to apply to what would today be called commercial speech, not to news commentary.

The fact that Section 1302 refers to lottery advertisements and prize lists in tandem strongly indicates that the two clauses should be read in a complementary fashion. *Third National Bank* v. *Impac Ltd.*, 432 U.S. 312, 322 (1977); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).[28] That construction of the Act is also reasonable. Lotteries, like the various other forms of gambling, often use prize lists for the same purpose as advertisements: to attract participants. By identifying prizes that will be (or have been) awarded in a lottery, a prize list promotes the future sales of lottery tickets. A prize list can also serve as a device for notifying winners, a function essential to the conduct of a lottery. The prize list clause therefore should be read as applying to the same type of conduct as the advertisement clause: to the

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[27] Some lottery sponsors may not have included a list of their prizes in every circular. For example, the Postmaster General reported that the National Banking Company issued bonds on the drawings of the Louisiana, Havana, and Kentucky lotteries and that one of its circulars said: "Circulars containing list of securities dealt in, with full and explicit information, sent free." *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, *supra*, at 9.

[28] "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. at 307. That maxim stated a "familiar" rule that was "applicable to all written instruments" in 1893. *Virginia* v. *Tennessee*, 148 U.S. at 519. It is reasonable to assume that Congress was aware of that rule when it enacted the Anti-Lottery Act of 1890 and to interpret Section 1302 with that rule in mind.

use of the mails to promote a lottery for profit by one who has a direct financial interest in the lottery or its promotion.

2. History also supports that conclusion. In construing a statute, "'[c]ourts may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it.'" *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 669 (1979) (citation omitted). The background to the Anti-Lottery Act of 1890 confirms that Congress did not adopt the Act in order to deny newspapers the use of the mails for publishing news stories or commentary about lotteries.

The target of the Anti-Lottery Act of 1890 was the Louisiana Lottery, not newspapers. The Act was adopted in order to bring a halt to that lottery, a multi-million dollar nationwide gambling enterprise that was the only lottery still operating legally in 1890 and that received more than 90% of its income from out-of-state bettors. Newspapers were included among the types of publications covered by the Act for one simple reason: They were a relatively inexpensive way to distribute lottery advertisements, and the Attorney General had concluded that the 1876 Act did not cover newspapers that published lottery advertisements. Congress found that the only effective way to suppress the Louisiana Lottery—to "cut [it] down to a mere local gambling establishment, answerable to the police powers of the local government" (21 Cong. Rec. 8717 (1890) (Rep. Hitt))—was to exclude from the mails newspapers and all other publications that contained its advertisements and related promotional materials and thereby to deny the Louisiana Lottery access to its primary source of income. The references in Section 1302 to "any advertisement of any lottery" and to "any list of the prizes drawn

or awarded by means of any such lottery" should be read in light of that overriding purpose.[29]

3. Further support for that interpretation of the prize list clause is found in this Court's contemporaneous decision in *Horner* v. *United States*, 147 U.S. 449 (1893). *Horner* involved a prosecution under the Anti-Lottery Act of 1890 for mailing a circular describing government bonds whose redemption value hinged on the date that the bonds were chosen for repayment. One of the questions was whether the circular " 'constitute[d] a list of the drawings at any lottery or similar scheme' " for purposes of the Act. 147 U.S. at 455 (quoting certified question). The circular contained a list of the bonds and the amount of money awarded. That list was not remotely

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[29] As previously noted, Congress expressly considered the question whether the prohibitions of the Anti-Lottery Act would infringe on the First Amendment, and concluded that they would not. As Representative Wilkinson explained (21 Cong. Rec. 8712 (1890)):

> It is said also that this is a blow at the freedom of the press, which, with freedom of speech, Congress is forbidden by the first amendment to the Constitution to make any abridgement of.
>
> Sir, if this is a blow against the freedom of the press it is such a blow as the State of New York has struck where lottery advertisements are forbidden in the newspapers. It is such a blow as other States in this Union have struck who have done likewise, but I have never yet heard it has there been considered a blow at the freedom of the press. The freedom of the press, as I understand it, consists in the right of the editor of the newspapers to freely express their views on public questions without let or hinderance by those in authority. It means to forbid that censorship of the press once so prevalent in European countries and still common in those countries, but this matter of advertisements seems to me to be a different affair. I hold in my hand as good a paper, as well supplied with news, as interesting a paper to read, perhaps, as any in the United States, a paper which is published in a State where lottery advertisements are forbidden and where no newspaper dare to print one, and it seems to thrive and prosper and makes no complaint that its rights have been interfered with.

similar to what would be called a "news story," but was virtually identical to the example of a contemporary prize list reprinted in the appendix to this brief. *Id.* at 451-453 n.1.[30] The Court found that the circular contained a list of the prizes awarded by a lottery. *Id.* at 467. Clearly, it was promotional material similar to that described in *Horner*, not a news report about a lottery, that Congress had in mind when it enacted the Anti-Lottery Act of 1890. See also *United States* v. *Politzer*, 59 F. 273, 277 (N.D. Cal. 1893) (applying *Horner* to a similar publication). See *France* v. *United States*, 164 U.S. 676 (1897), and *Francis* v. *United States*, 188 U.S. 375 (1903) (prosecutions under the Anti-Lottery Act of 1890 for gambling activities that would today be called "numbers" or "policy").

That Section 1302 does not reach all types of information about lotteries can also be seen when that law is compared with the parallel statute regulating the broadcasting of lottery-related information, 18 U.S.C. 1304, which was enacted as part of the Communications Act of 1934, 47 U.S.C. (& Supp. III) 151 *et seq.* Section 1304 prohibits broadcasting "any advertisement of *or information concerning* any lottery * * * or any list of the prizes drawn or awarded by means of any such lot-

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[30] The circular was reprinted in a footnote in the Court's opinion. It contained a list of the bonds that had been chosen (147 U.S. at 451 n.1) and a list of money awarded (*id.* at 453 n.1):

On one bond	250,000 gulden
On one bond	25,000 gulden
On one bond	15,000 gulden
On one bond	10,000 gulden
On 2 bonds, each at 5000 gulden	10,000 gulden
On 3 bonds, each at 2000 gulden	6,000 gulden
On 6 bonds, each at 1000 gulden	6,000 gulden
On 15 bonds, each at 500 gulden	7,500 gulden
On 30 bonds, each at 400 gulden	12,000 gulden

Compare the promotional materials distributed by the Louisiana Lottery. App., *infra*, 11a-12a.

tery * * * whether such list contains any part or all of such prizes" (emphasis added). The term "any * * * information" clearly includes matters that are not covered by the terms "advertisement" and "prize list" that also appear in the Act.[31] Section 1304 therefore shows that Congress knows how to draft a statute containing a more expansive ban on the distribution of lottery-related information when it wishes to do so, and that Section 1302 does not cover every type of information about lotteries.

Finally, construing Section 1302 to reach only commercial speech is not "plainly contrary to the intent of Congress" (*DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, No. 86-1461 (Apr. 20, 1988), slip op. 6), and it avoids the constitutional issues raised by the district court's interpretation of the Act. *Ibid.*; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501 (1979); *United States* v. *12 200-Ft. Reels of Super 8MM.*

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[31] The legislative history of Section 1304 suggests that the term "any * * * information" was intentionally added to broaden the scope of that law. The House used the phrase "any information," not "advertisement," in its version of a bill that was designed to modify the Radio Act of 1927, ch. 169, 44 Stat. 1162. H.R. Rep. 221, 72d Cong., 1st Sess. 7, 8 (1932). The Senate, however, substituted the term "advertisement" for "information" in order to "more nearly place[] radio stations on the same basis as newspapers in connection with broadcasting information as to lotteries." S. Rep. 564, 72d Cong., 1st Sess. 10 (1932); S. Rep. 1004, 72d Cong., 2d Sess. 12 (1932); S. Rep. 1045, 72d Cong., 2d Sess. 11 (1933). The Conference Committee resolved the dispute by using both terms in the Act. H.R. Conf. Rep. 2106, 72d Cong., 2d Sess. 3, 6 (1933); 76 Cong. Rec. 5204 (1933) (Sen. Dill). That bill was pocket vetoed by President Hoover, but the identical provision became law the following year in the Communications Act of 1934 (see S. Rep. 781, 73d Cong. 2d Sess. 8 (1934); H.R. Conf. Rep. 1918, 73d Cong., 2d Sess. 26, 49 (1934)), and is now codified at 18 U.S.C. 1304.

Of course, the fact that Section 1304 includes more types of commercial speech than Section 1302 does not mean that Section 1304 should be read to apply to noncommercial speech, such as news stories or editorials about lotteries. Just as Section 1302 should be read in a manner consistent with the First Amendment, so too Section 1304 should be read in that manner.

Film, 413 U.S. 123, 130 n.7 (1973). For example, in the *12 200-Ft. Reels of Film* case the Court said (413 U.S. at 130 n.7) that it would interpret the term "obscene" in a federal statute prohibiting the importation of obscene material in a manner consistent with the definition of obscenity adopted in *Miller* v. *California*, 413 U.S. 15, 25 (1973). A similar analysis is appropriate in this case.

4. In sum, the district court erred in concluding that commercial speech and advertising are coterminous and that a law regulating something other than advertising cannot be regarded as a regulation of commercial speech. The prize list clause of Section 1302 can and should be read to apply only to a form of commercial speech, *i.e.*, the publication of a list of prizes awarded by a lottery when the list is published by a party who has a direct financial interest in the lottery or its promotion.[32] Thus, if a newspaper published a list of lottery prizes because it expected to receive a share of the lottery's proceeds or because the newspaper sponsored the lottery itself, such a list would be covered by Section 1302, because it would be speech related to a commercial transaction in which the newspaper has a financial interest. Similarly, if a newspaper were paid to publish a list of lottery prizes, that list would be covered by the statute, because it would be speech about a commercial transaction that the newspaper had been paid to promote.

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[32] Indeed, a list of the prizes to be awarded at a future drawing of a lottery may be regarded as an implicit proposal to engage in a commercial transaction and therefore as falling within what this Court has identified as "the core notion of commercial speech." *Youngs Drug Products*, 463 U.S. at 66. See *Central Hudson*, 447 U.S. at 580 (Stevens, J. concurring in the judgment) ("A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept.") (footnote omitted).

On the other hand, Section 1302 should not be read to apply to other forms of commentary about lotteries, such as editorials, news stories, or documentaries. If a newspaper published a list of lottery prizes because it believed that the list was newsworthy or because it sought, for altruistic reasons, to promote a lottery's success, that list would not amount to commercial speech. That would follow even if the newspaper published the list because the publisher hoped to increase its circulation and thereby generate additional revenues. The profit motive of a newspaper publisher does not itself render a newspaper's contents commercial speech (*Pittsburgh Press*, 413 U.S. at 384-385; *New York Times Co.* v. *Sullivan*, 376 U.S. at 266) and therefore does not transform the publication of information about a future lottery into a violation of Section 1302. When the prize list clause in Section 1302 is construed in the foregoing manner, that clause is constitutional for the same reasons given by the district court for upholding the advertisement clause.

II. SECTION 1302 IS A REASONABLE REGULATION OF COMMERCIAL SPEECH

This Court has held that commercial speech is entitled to a limited degree of First Amendment protection provided it concerns a lawful activity and is not misleading or fraudulent. Nevertheless, the Court has made clear that even commercial speech that truthfully promotes a lawful activity may be regulated, both as to the time, place, and manner of its dissemination and as to its content, in ways and for reasons that cannot be applied to other types of speech. The government may restrict commercial speech if the government's interests are substantial, if the restriction directly advances those asserted interests, and if the restriction is no more extensive than necessary to serve those interests. *Central Hudson*, 447 U.S. at 564. Under this standard, commer-

cial speech may in some cases be prohibited altogether—not despite, but precisely because of, its content. *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986) (gambling advertising); *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E. 2d 138, appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982) (alcohol advertising); *Pittsburgh Press* (advertising that includes gender discrimination); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), aff'd summarily *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972) (broadcast cigarette advertising). Under those decisions, the prize list clause, like the advertisement clause, is a valid regulation of commercial speech.

A. Section 1302 Directly Promotes Several Legitimate Governmental Interests

The first step in the inquiry is whether the government has a substantial interest in restricting the speech. *Posadas*, 478 U.S. at 340-341; *Central Hudson*, 447 U.S. at 566. Section 1302 easily passes that test, since it regulates expression promoting an activity that Congress and the states may discourage or suppress due to its potentially injurious effects.

1. *Section 1302 may be applied to prohibit the use of the mails to promote an illegal lottery*

Section 1302, by its terms, applies to both legal and illegal lotteries, as this Court recognized in *Horner* v. *United States*, 147 U.S. at 456, 466. To the extent that the Act applies to lotteries that are illegal under federal or state law, it is clearly valid, since the government may regulate or ban entirely speech proposing an illegal transaction. *E.g.*, *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Central Hudson*, 447 U.S. at 563-564; *Pittsburgh Press*, 413 U.S. at 388.

That alone is sufficient to uphold the advertisement and prize list clauses against a facial challenge.[33]

2. *Section 1302 may be applied to prohibit the use of the mails to promote a lottery that is legal under federal or state law*

a. Aside from preventing the promotion of illegal lotteries, Section 1302 furthers other legitimate governmental interests, as the district court explained. J.S. App. 8a-11a. First, it protects the policies of those states that have forbidden private lotteries from operating within their borders. Second, by restricting the growth of private lotteries, it reduces the threat of organized

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[33] In this respect, the district court's judgment holding invalid the prize list clause in Section 1302 goes well beyond decisions of the Second and Third Circuits concerning the constitutionality of the related broadcasting provision, Section 1304. The Second Circuit in *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (1969), cert. denied, 396 U.S. 1061 (1970), upheld the constitutionality of Section 1304 as applied to information directly promoting a state-conducted lottery. Although the Third Circuit in *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (1974) (en banc), vacated and remanded, 420 U.S. 371 (1975), held that Section 1304 would be unconstitutional if it were applied to prohibit the broadcasting of a winning lottery number in a lawful, state-conducted lottery, the court held that the statute could constitutionally be applied to compensated broadcasts, and possibly to some uncompensated promotional advertisements beyond the context of broadcast journalism. 491 F.2d at 222. This Court granted certiorari to review the Third Circuit's decision, but later dismissed the case as moot after Congress enacted 18 U.S.C. 1307, which exempts state-run lotteries from Section 1304. *United States* v. *New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975).

Under the district court's judgment in this case, which invalidated the prize list clause in its entirety, J.S. App. 20a, the Postmaster could not apply the prize list clause to any type of publication, including circulars prepared and disseminated by the sponsors of an illegal numbers racket. Both the Second and Third Circuits, however, would uphold Section 1302 if it were applied in that manner.

criminal infiltration of gambling enterprises and makes it easier for the states that permit lotteries to police that activity. The statute therefore advances principles of federalism by allowing those states that have determined that private lotteries are contrary to public policy to implement that judgment.[34]

Those interests are "substantial" under *Central Hudson*. The states clearly may protect the welfare of their citizens against the harms historically associated with gambling. Opponents of gambling have long argued that it contributes to corruption and the growth of organized crime; that it underwrites bribery, narcotics trafficking, and other crimes; that it imposes a regressive tax on the poor, the persons who are least able to bear that burden; and that it offers a false but sometimes irresistible hope of financial advancement.[35] The states' belief that gambling can be harmful is therefore not irrational. In fact, the Court expressly so held in *Posadas*. 478 U.S. at 341.

The states may also treat lotteries in the same manner as any other form of gambling. At one time, this Court expressed the view that lotteries are beset with "inherent

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[34] Moreover, by exempting state-run lotteries from Section 1302, Congress has also allowed the states to maintain what is in effect a local monopoly over lawful lottery activity as a means of raising state revenues.

[35] See, *e.g.*, the Congressional Statement of Findings and Purpose preceding the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923, 18 U.S.C. 1961 note; S. Rep. 91-617, 91st Cong., 1st Sess. 71 (1969); President Nixon's Message on Organized Crime, H.R. Doc. 91-105, 91st Cong., 1st Sess. 5-6 (1969); S. Rep. 1579, *supra*, at 1, 4; *Brown* v. *Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 494-495 (1984); *Phalen* v. *Virginia*, 49 U.S. (8 How.) at 168; President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 2 (1967); President's Commission on Organized Crime, *Interim Report to the President and the Attorney General—The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 51 (1984); *Gambling* 74-88, 680-734; G. Sullivan, *supra*, at 45-49, 120-128.

vices," and that "it cannot admit of a doubt" that they are "demoralizing in their effects, no matter how carefully regulated." *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1879). Indeed, during the last century, it was the generally accepted wisdom that "the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 167-168 (1850). See *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321, 355 (1903). More recently, it has been noted that "[p]eriodically every form of commercial gambling has been infected by corruption, attesting to the unique attraction between organized crime groups and gambling's financial promise. Horse racing, casino operations, professional sports, state run lotteries—legal gambling of all kinds has been infiltrated in some form, at some time or other, by organized crime." 7 President's Comm'n on Organized Crime, *Hearing on Organized Crime and Gambling* vi (1985). See S. Rep. 100-446, 100th Cong., 2d Sess. 25 (1988) ("bingo is certainly as much a target for criminal infiltration as any other cash gaming operation").

This Court has held that Congress has the power under the Postal Clause, Art. I, § 8, Cl. 7, to assist the states by excluding from the mails "such printed matter or merchandise as may seem objectionable to it upon the ground of public policy." *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507 (1904). Moreover, because the states lack the authority to regulate what is sent through the mails,[36] Congress reasonably could have believed that

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[36] J.S. App. 12a; see *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981) (the efficient operation of the postal system requires adoption of "regulations of

federal legislation was necessary in order to prevent one state from foisting its preferences on the citizens of another.

b. Those interests are the same ones that persuaded this Court in *Ex parte Jackson* and *In re Rapier* to uphold the predecessors to Section 1302. This Court reasoned in those cases that Congress has the authority under the Postal Clause to forbid the use of the mails to promote lotteries because participating in a lottery is not a fundamental right and because Congress had not forbidden newspapers from distributing lottery-related materials by means other than the mails. The Court thus held that Congress could support the states' effort to safeguard the public against the harmful effects of gambling by excluding lottery-related promotional materials from the mails. *In re Rapier*, 143 U.S. at 134-135; *Ex parte Jackson*, 96 U.S. at 736-737.

That rationale is still valid. Participating in a lottery, like any other form of gambling, is not a constitutionally protected activity. The federal government and the states may regulate gambling, or prohibit it altogether. *Posadas*, 478 U.S. at 345.[37] Even today, most states still

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a general character having uniform applicability" throughout the country); *In re Rapier*, 143 U.S. at 134; *Ex parte Jackson*, 96 U.S. at 732.

[37] See also *Lewis* v. *United States*, 348 U.S. 419, 422-423 (1955), overruled in part on other grounds, *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-358; *Ah Sin* v. *Wittman*, 198 U.S. 500, 505-507 (1905). As Justice Holmes explained in *Otis* v. *Parker*, 187 U.S. 606, 609 (1903) (citations omitted):

> If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakeable infringement of rights secured by the fundamental law." * * * [W]agers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought

prohibit most forms of privately run organized gambling, such as gambling casinos, and regulate other forms of gambling, such as lotteries. Although Congress has narrowed the Act by creating an exception for state-run lotteries, 18 U.S.C. 1307,[38] that exception is not inconsistent with the overall regulatory scheme, as the district court found. J.S. App. 9a-10a. Congress could rationally believe that state-run lotteries are less likely to become large-scale gambling syndicates—latter-day versions of the Louisiana Lottery—because of state oversight and control. See G. Sullivan, *supra*, at 122-123. At the same time, the exception accommodates the interests of the states that operate lotteries themselves. That exercise in lateral federalism is a legitimate undertaking for Congress. See *South Carolina* v. *Baker*, No. 94, Orig. (Apr. 20, 1988), slip op. 5-7; *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-554 (1985).[39]

It is doubtless true that lotteries are no longer held in the same disrepute they enjoyed when this Court decided

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pardonable at least. The case would not be decided differently if lotteries had been lawful when the Fourteenth Amendment became law, as indeed they were in some civilized States.

[38] Indeed, as previously noted, Congress has recently narrowed the scope of Section 1302 even further by adopting additional exceptions for legal lotteries operated by charitable organizations or by commercial businesses in certain situations, the Charity Games Advertising Clarification Act of 1988, and for lotteries operated by Indian tribes, the Indian Gaming Regulatory Act.

[39] See S. Rep. 93-1404, 93d Cong., 2d Sess. 2 (1974) ("The purpose of * * * [Section 1307 is] to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States."); H.R. Rep. 93-1517, 93d Cong., 2d Sess. 5 (1974) ("in considering this legislation [*i.e.*, Section 1307] the committee was faced with the task of making a reasonable balance between Federal and State interests in this area. Of course, this balance includes the consideration and protection of the policies and interests of the States which do not provide for such lotteries.").

Ex parte Jackson and *In re Rapier*. Attitudes change over time, sometimes cyclicly, as new demons replace old ones. Indeed, with respect to lotteries, our attitudes may have returned to the same phase of the cycle that existed in the colonial period, when lotteries were considered an acceptable activity, or "were thought pardonable at least." *Otis v. Parker*, 187 U.S. 606, 609 (1903). Forty-five states now permit some form of gaming, such as bingo.[40] Many run state lotteries, or permit private ones to operate. The states have adopted state-run lotteries as an alternative to raising taxes and see them as a means of tapping into money that otherwise might be taken in by organized crime; private enterprises use lotteries as a means of attracting customers; and charitable organizations use lotteries as fundraising devices.[41] But the debate on the wisdom or morality of lotteries has always been undertaken in the legislatures, not the courts. It would be a mistake to conclude that today's views towards lotteries should serve as the basis for judging the constitutionality of their regulation, for today's attitudes may once again come to be seen to be as mistaken as the ones they replaced.

c. Nor is it true, as the district court suggested (J.S. App. 15a), that *Jackson* and *Rapier* have been surpassed by developments in First Amendment law. Two developments are potentially relevant here. First, the Court has made clear that, even though Congress need not operate a post office at all, the First Amendment limits Congress's power to exclude material from the mails due to its content. *Youngs Drug Products*, 463 U.S. at 69-70 n.18; *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Lamont* v. *Post-*

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[40] S. Rep. 100-446, *supra*, at 11-12.

[41] See H.R. Rep. 100-557, 100th Cong., 2d Sess. Pt. 1, at 4 (1988); 134 Cong. Rec. S16319 (daily ed. Oct. 14, 1988); *id.* at H10445 (statement of Rep. Frank); S. Rep. 100-446, *supra*, at 2; *id.* at 33 (Additional Views of Sen. McCain); *id.* at 36 (Additional Views of Sen. Evans).

master General, 381 U.S. 301 (1965). Second, commercial speech, which formerly was thought not to implicate the First Amendment at all, *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), has since 1976 been entitled to some constitutional protection. *Virginia Pharmacy Bd., supra.* Neither development, however, has undercut *Jackson* and *Rapier.*

It is now settled law, as Justice Holmes once remarked in dissent, that "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407, 437 (1921). But it is equally well settled that Congress may exclude from the mails certain types of expression associated with injurious activities. For example, on several occasions the Court has sustained over First Amendment challenges the constitutionality of 39 U.S.C. (& Supp. IV) 3005 and 3007, which empower the Postmaster General to initiate administrative and judicial proceedings in order to intercept mailings designed to promote fraudulent schemes. *Public Clearing House* v. *Coyne, supra*; *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Lynch* v. *Blount*, 505 U.S. 1007 (1972), aff'g 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court) (§ 3005); *Outpost Development Corp.* v. *United States*, 414 U.S. 1105, aff'g 369 F. Supp. 399 (C.D. Cal. 1973) (three-judge court) (both sections). Thus, although some of the language in *Ex parte Jackson* and *In re Rapier* about the scope of the postal power would have to be qualified today, the holdings of those cases—that Congress may use its postal power to assist the states in the regulation of lotteries and other injurious schemes—remain fully valid.[42]

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[42] In fact, the Court relied on *In re Rapier* in upholding those laws. *Public Clearing House* v. *Coyne*, 194 U.S. at 508 (relying on *Rapier*); *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. at 190-191

Similarly, although the Court has in recent years extended a measure of First Amendment protection to commercial speech, the Court's decisions also demonstrate that Congress still has the power to regulate commercial speech used in the promotion of gambling activities. In particular, this Court's 1986 decision in *Posadas* upheld regulations prohibiting the commercial advertising of casino gambling to the residents of Puerto Rico, even though casino gambling and other gambling activities were legal in that jurisdiction. The Court held that Puerto Rico has a legitimate interest in restricting the commercial advertising of casino gambling in order to safeguard the moral well-being of its citizens, and to prevent the corruption and infiltration of organized crime that, unfortunately, often shadows organized gambling. 478 U.S. at 341. In addition, the Court ruled that restricting commercial advertising is a rational way to advance those interests, because the government could reasonably believe that the commercial advertising of casino gambling would enhance the demand for that activity. *Id.* at 341-342. The restriction was also reasonably tailored to Puerto Rico's interest in safeguarding the welfare of its citizens, because it was focused on residents. *Id.* at 343-344. Finally, the Court held that, since Puerto Rico could ban gambling altogether, it could take the less restrictive step of prohibiting the commercial advertising of that activity. *Id.* at 345-347. As the

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(relying on *Coyne*). That principle has also been endorsed in subsequent decisions. *E.g.*, *Friedman* v. *Rogers*, 440 U.S. 1 (1979). See also *United States Postal Service* v. *Athena Products, Ltd.*, 654 F.2d 362, 366-368 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982) (upholding 39 U.S.C. (& Supp. IV) 3005 and 3007 over a First Amendment challenge); *Original Cosmetics Products, Inc.* v. *Strachan*, 459 F. Supp. 496 (S.D.N.Y. 1978), aff'd mem., 603 F.2d 214 (2d Cir.) (Table), cert. denied, 444 U.S. 915 (1979) (§ 3005); *Hollywood House Int'l, Inc.* v. *Klassen*, 508 F.2d 1276 (9th Cir. 1974) (§ 3005); *United States Postal Service* v. *Beamish*, 466 F.2d 804, 806-807 (3d Cir. 1972) (§ 3007).

Court summarized last Term, "[i]n *Posadas* the Court concluded that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'" *Meyer* v. *Grant*, slip op. 10 (quoting *Posadas*, 478 U.S. at 345-346).

The regulatory scheme at issue here parallels the one upheld in *Posadas*. Congress has the power under the Commerce Clause, Art. I, § 8, Cl. 3, to prohibit the distribution in interstate or foreign commerce of lottery materials, such as tickets (*Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-358), or to regulate local forms of gambling that affect interstate commerce. *United States* v. *Hawes*, 529 F.2d 472, 477-478 (5th Cir. 1976) (collecting cases); *United States* v. *Hunter*, 478 F.2d 1019, 1021 (7th Cir.) (Stevens, J.), cert. denied, 414 U.S. 857 (1973) (upholding over a Commerce Clause challenge the constitutionality of 18 U.S.C. (& Supp. IV) 1955, which makes it a crime to conduct a gambling business in violation of state law). See generally *Perez* v. *United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Thus, Congress could have altogether prohibited private lotteries that are in or affect interstate commerce. Instead, Congress chose to limit the range over which private lotteries can operate by forbidding them from sending promotional materials through the mails. That judgment is lawful under *Posadas*. *Posadas* therefore shows that the Court's decisions in *Ex parte Jackson* and *In re Rapier* have not been eclipsed by the development of the commercial speech doctrine.

B. The Mailing Restrictions In Section 1302 Directly Promote Congress's Interests

The second step in the *Central Hudson* analysis is whether the advertising and prize list clauses directly advance the interests noted above. *Posadas*, 478 U.S. at

341; *Central Hudson*, 447 U.S. at 566. Section 1302 also passes that hurdle.

Posadas held that a legislature may reasonably conclude that restricting the advertising of gambling will reduce the consumer demand for that activity, and will thereby further the government's interest in protecting the public against the harms associated with gambling. 478 U.S. at 341-342. That ruling is consistent with other decisions by this Court and lower federal and state courts holding that a legislature may reasonably believe that a restriction on the advertising of alcoholic beverages will reduce the consumer demand for that product.[43] That conclusion also makes economic sense. Prohibiting the advertising of a particular product makes it more costly for consumers to learn about and purchase a good (see *Virginia Pharmacy Bd.*, 425 U.S. at 763-765;

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[43] See *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E.2d 138, 142 ("The advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption."), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 749-750 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984) ("sufficient reason exists to believe that [alcohol] advertising and consumption are linked to justify the [advertising] ban, whether or not 'concrete scientific evidence' exists to that effect"); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 501 (10th Cir. 1983) ("prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems"), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729, 734-735 (R.I. 1985); *R.I. Liquor Stores* v. *Evening Call Pub. Co.*, 497 A.2d 331, 335-337 (R.I. 1985). Cf. *Republic Entertainment, Inc.* v. *Clark County Liquor & Gaming Licensing Bd.*, 99 Nev. 811, 672 P.2d 634 (1983) (upholding local regulations prohibiting unlicensed escort services from advertising); *Princess Sea Indus., Inc.* v. *State*, 97 Nev. 534, 635 P.2d 281 (1981), cert. denied, 456 U.S. 926 (1982) (upholding state statute prohibiting licensed brothels from advertising).

Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 26-28 (1979)) and therefore complements a restriction on its distribution. It was not irrational, therefore, for Congress to conclude that barring lotteries from sending promotional materials through the mails will limit participation in lotteries, and that the advertising and prize list restrictions will complement the prohibitions in Sections 1301 and 1302 on the use of instrumentalities of interstate and foreign commerce or the mails to distribute lottery tickets. That reasonable belief, *Posadas* held, is all the First Amendment demands. 478 U.S. at 342 (the direct advancement step is met where the legislative judgment is "a reasonable one"). See *Metromedia*, 453 U.S. at 508-509 (plurality opinion) ("direct advancement" step met where the legislative judgment "is not manifestly unreasonable"; accepting "the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety"); *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for [the product].").

C. The Mailing Restrictions In Section 1302 Are No More Extensive Than Necessary

The last step in the *Central Hudson* analysis is whether the restriction is no more extensive than necessary to serve the government's interest. *Posadas*, 478 U.S. at 343; *Central Hudson*, 447 U.S. at 566. Section 1302 also passes that test.

1. Section 1302 does not forbid publications, including newspapers, from publishing news stories or commentary about lotteries. In fact, it does not even prohibit publications from publishing lottery advertisements or lists of prizes they award. It simply forbids them from using the mails if they choose to promote lotteries. Thus, Section 1302 does not interfere with a newspaper's ability to inform the public about newsworthy events, nor does it intrude into the editorial process in any material way.

The act affects only a newspaper's decision whether to publish lottery advertisements and prize lists, and that does not materially interfere with a newspaper's editorial judgment. See *Pittsburgh Press*, 413 U.S. at 387 ("this kind of editorial judgment does not necessarily strip commercial advertising of its commercial character"); *id.* at 387 n.11 (citing *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), which upheld the related broadcast advertising ban in 18 U.S.C. 1304). Accordingly, Congress has gone no further than necessary to accomplish its goals. See *Posadas*, 478 U.S. at 343-344; *Metromedia*, 453 U.S. at 508 (plurality opinion).

2. Appellee contends (87-1943 J.S. 13-15) that Section 1302 is overbroad because it is not limited to large-scale interstate gambling enterprises and applies to lotteries operated on a local basis and to newspapers with only a minimal interstate circulation. Appellee, however, has misinterpreted the last part of the *Central Hudson* test. That element is designed to ensure that the regulation of commercial speech does not also restrict other expression, such as political speech, which is entitled to greater immunity than commercial speech. See *Posadas*, 478 U.S. at 343-344. It does not demand that Congress limit the restriction on commercial speech to only those commercial transactions that pose the risks that Congress fears. As a general rule, "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented [Congress] may do so." *Westfall* v. *United States*, 274 U.S. 256, 259 (1927). In any event, even if locally run lotteries do not today pose the same risks as large-scale interstate organized gambling, Congress may reasonably conclude that reducing the commercial promotion of gambling by all lotteries is a valuable way to prevent some of them from growing into large-scale gambling enterprises.

3. Amicus Minnesota Civil Liberties Union argues that there should be a special exception for newspapers from

Section 1302, since the Act, it claims, has a "disproportionate and unfair impact" on newspapers. MCLU Br. 18. In effect, amicus urges the Court to resurrect under the First Amendment the same exception that Congress eliminated from the law when it passed the Anti-Lottery Act of 1890 and has refused to incorporate into the act since then.[44]

This Court's decisions do not require that result. *In re Rapier* declined to create a special exemption for newspapers, and *Pittsburgh Press*, the first of the modern commercial speech cases, also refused to do so, ruling instead that a newspaper can be prohibited from publishing commercial advertisements promoting an illegal activity. 413 U.S. at 389. As the Court explained, "a commercial advertisement remains commercial in the hands of the media, at least under some circumstances," such as when a newspaper simply reprints an advertisement prepared by its sponsor. *Id.* at 387. Section 1302 imposes a similar restriction. The only difference between the advertisement in *Pittsburgh Press* and the activity that appellee's members desire to be paid to promote is that certain lotteries are not illegal in Minnesota. But that distinction should be immaterial in light of Congress' interest in helping the states that prohibit lotteries, and given the fact that the act does not interfere with the editorial process.

Creating an exception for newspapers also would undoubtedly encourage lottery sponsors to publish lottery "newspapers" rather than "circulars" in order to shelter their promotional efforts. There is even some evidence that such a practice took place before newspapers were

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[44] The issue was brought to Congress's attention as recently as 1974. See H.R. Rep. 93-1517, *supra*, at 24 (report accompanying a bill proposing the exemption for state-run lotteries now found at 18 U.S.C. 1307) (Additional Views of Rep. Froehlich).

added to the law by the Anti-Lottery Act of 1890.[45] An exception for newspapers would therefore swallow the rule.[46]

To be sure, Section 1302 adds to a newspaper's publication costs if it wishes to use the mails. A newspaper must either run a separate edition without lottery advertising or prize lists in order to send its papers in the mails, or it must print circulars that are inserted into its street editions, or it must forgo the revenues from lottery promotions. See G. Sullivan, *supra*, at 106-107 (describing the practice of "replating" different editions in New York following the adoption of a state-run lottery). But history shows that Section 1302 has not driven newspapers out of business or cheapened the public dialogue. Representative Wilkinson's prediction during the debate on the Anti-Lottery Act of 1890 (page

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[45] A report from the Postmaster General to the Speaker of the House of Representatives described two such "newspapers." *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, *supra*, at 12.

[46] Of course, the courts could attempt to limit the exception to "bona fide" newspapers. That solution, however, poses significant definitional problems. Unless any publication that remotely resembles a newspaper could invoke the exception, the courts would need to distinguish bona fide newspapers from ones that exist simply to evade the law. Doing so would require the courts to pursue an undirected line-drawing exercise, because neither the text nor purposes of the First Amendment supply any assistance in making that determination. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 683 n.22 (1984) (citation omitted) ("There is * * * much truth in the District Court's observation that '[t]he definition of a journal, newspaper or album is anyone's game to play.' ") (opinion of Brennan, J.); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring); *Branzburg* v. *Hayes*, 408 U.S. 665, 703-705 & n.40 (1972). It is also far from clear why the First Amendment should encourage discrimination of this type, because "the traditional doctrine [is] that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as the large metropolitan publisher who uses the latest photocomposition methods." *Id.* at 704; *Lovell* v. *City of Griffin*, 303 U.S. 444, 450, 452 (1938).

26 note 29, *supra*) has proved correct: Limiting the ability of newspapers to carry commercial lottery advertisements and prize lists has not become a vehicle for censorship of the press. To paraphrase the court's aphorism in *Walz* v. *Tax Commission*, 397 U.S. 664, 678 (1970), if a restriction on the commercial promotion of lotteries is the first step towards censorship of the press, the second step has been long in coming.

CONCLUSION

In No. 87-1943, the judgment of the district court upholding the advertisement clause in 18 U.S.C. 1302 should be affirmed. In No. 87-1956, the judgment of the district court invalidating the prize list clause in 18 U.S.C. 1302 should be reversed.

Respectfully submitted.

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NOVEMBER 1988

APPENDIX A

1. Article I, § 8, Cl. 7 of the Constitution of the United States provides in relevant part as follows:

> The Congress shall have Power * * * To establish Post Offices and Post Roads.

2. The First Amendment to the Constitution of the United States provides in relevant part as follows:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

3. 18 U.S.C. 1301 provides as follows:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift[] enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

4. 18 U.S.C. 1302 provides as follows:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

5. 18 U.S.C. 1303 provides as follows:

Whoever, being an officer or employee of the Postal Service, acts as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme,

shall be fined not more than $100 or imprisoned not more than one year, or both.

6. 18 U.S.C. 1304 provides as follows:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

7. 18 U.S.C. 1307 provides as follows:

> (a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—
>
> > (1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or
> >
> > (2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.
>
> (b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—
>
> > (1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests.

8. 39 U.S.C. 3001 provides in relevant part as follows:

(a) Matter the deposit of which in the mails is punishable under Section 1302 * * * of title 18 * * * is nonmailable.

9. 39 U.S.C. (& Supp. IV) 3005 provides in relevant part as follows:

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of

any kind, the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender;

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note; and

(3) requires the person or his representative to cease and desist from engaging in any such scheme, device, lottery, or gift enterprise.

For purposes of the preceding sentence, the mailing of matter which is nonmailable under section 3001(d) by any person shall constitute prima facie evidence that such person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c) As used in this section and section 3006 of this title, the term "representative" includes an agent

or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery, (2) tickets or other materials concerning such a lottery within that State to addresses within that State, or (3) an advertisement promoting the sale of a book or other publication, or a solicitation to purchase, or a purchase order for any such publication, if (A) such advertisement, solicitation, or purchase order is not materially false or misleading in its description of the publication; (B) such advertisement, solicitation, or purchase order contains no material misrepresentation of fact: * * * Paragraph (3) shall not be applicable to any publication, advertisement, solicitation, or purchase order which is used to sell some other product in which the publisher or author has a financial interest as part of a commercial scheme. * * *

10. The Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625 (Nov. 7, 1988), provides as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Charity Games Advertising Clarification Act of 1988".

SEC. 2. AMENDMENTS RELATING TO THE MAILING AND BROADCAST OF ADVERTISEMENTS FOR LEGAL LOTTERIES AND SIMILAR ENTERPRISES.

(a) STATE-CONDUCTED LOTTERIES UNDER TITLE 18.—Subsection (a) of section 1807 of title

18, United States Code, is amended to read as follows:

"(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—

"(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—

"(A) contained in a publication published in that State or in a State which conducts such a lottery; or

"(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

"(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

"(A) conducted by a not-for-profit organization or a governmental organization; or

"(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization."

(b) DEFINITION OF NOT-FOR-PROFIT ORGANIZATION.—Subsection (d) of section 1307 of title 18, United States Code, is amended by adding at the end thereof "For purposes of this section, the term a 'not-for-profit organization' means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.".

(c) POSTAL SERVICE REGULATION OF LOTTERIES.—Paragraph (1) of section 3005(d) of title 39, United States Code, is amended to read as follows: "(1) publications containing advertisements, lists of prizes, or information concerning a lottery, which are exempt, pursuant to section 1307 of title 18 of the United States Code, from the provisions of sections 1301, 1302, 1303, and 1304 of title 18 of the United States Code,".

SEC. 3. TECHNICAL AMENDMENTS.

(a) AMENDMENTS TO TITLE 18, UNITED STATES CODE.—Chapter 61 of title 18, United States Code, is amended as follows:

(1) The section heading of section 1307 is amended to read as follows:

"§ 1307. Exceptions relating to certain advertisements and other information and to State-conducted lotteries".

(2) The item relating to section 1307 in the table of sections at the beginning of chapter 61 is amended to read as follows:

"Sec. 1307. Exceptions relating to certain advertisements and other information and to State-conducted lotteries.".

(3) Subsection (d) of section 1307 is amended by inserting after "purposes of" the following: "subsection (b) of".

(4) The first sentence of section 1304 is amended by inserting after "radio" the following: "or television."

SEC. 4. SEVERABILITY.

If any provision of this Act or the amendments made by this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act and the amendments

made by this Act, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall take effect 18 months after the date of the enactment of this Act.

11. Section 21 of the Indian Gaming Regulatory Act, Pub. L. No. 100-497 (Oct. 17, 1988), provides as follows:

Consistent with the requirements of this Act, sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act.

12. Section 123.42 of the *Domestic Mail Manual* (1988) provides as follows:

.42 Lottery Matter (18 U.S.C. 1302)

.421 Any scheme or promotion, whether or not lawful under the laws of any state, which, upon payment of consideration, offers a prize dependent in whole or in part upon lot or chance, is a lottery.

.422 The following matter is unlawful mail matter:

a. Any letter, package, postal card, or circular which advertises, invites or otherwise permits or facilitates participation in a lottery.

b. Any lottery ticket or part thereof or substitute.

c. Any form of payment for a lottery ticket or share.

d. Any newspaper, circular, pamphlet, or publication of any kind containing any advertising of a lottery or similar enterprise, or any list of prizes awarded in such an enterprise.

.423 This section does not apply to any fishing contest not conducted for profit, wherein prizes are awarded for the species, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event (18 U.S.C. 1305).

.424 This section does not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a state acting under the authority of its law contained in a newspaper published in that state or in an adjacent state which conducts such a lottery, or to the mailing to addresses within a state of tickets or other material concerning a lottery conducted by that state under the authority of its law (18 U.S.C. 1307).

APPENDIX B

The following item is reproduced from *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, 46th Cong., 2d Sess. 35-36 (1880):

LA. S.L.

UNPRECEDENTED ATTRACTION—OVER HALF A MILLION DISTRIBUTED—LOUISIANA STATE LOTTERY COMPANY.

This institution was regularly incorporated by the legislature of the State for educational and charitable purposes in 1868, for the term of twenty-five years, to which contract the inviolable faith of the State is pledged, with a capital of $1,000,000, to which it has since added a reserve fund of $350,000. Its grand single number drawings will take place monthly. It never scales or postpones. Look at the following distribution:

GRAND PROMENADE CONCERT.

During which will take place the 115th grand monthly and the extraordinary semi-annual drawing at New Orleans, Tuesday, December 16, 1879, under the personal supervision and management of Gen. G. T. Beauregard, of Louisiana, and Gen. Jubal A. Early, of Virginia. [*]

Capital prize, $100,000.

NOTICE.—Tickets are ten dollars only; halves, $5; fifths, $2; tenths, $1.

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* Famous confederate generals Beauregard and Early were hired by the Louisiana Lottery "[t]o inspire the public with confidence" (H. Asbury, *supra*, at 86) and "to give the proceedings an air of respectability and honesty." G. Sullivan, *supra*, at 54.

LIST OF PRIZES.

1	capital prize of $100,000	$100,000
1	grand prize of $50,000	50,000
1	grand prize of $20,000	20,000
2	large prizes of $10,000	20,000
4	large prizes of $5,000	20,000
20	prizes of $1,000	20,000
50	prizes of $500	25,000
100	prizes of $300	30,000
200	prizes of $200	40,000
600	prizes of $100	60,000
10,000	prizes of $10	100,000

APPROXIMATION PRIZES.

100	approximation prizes of $200	20,000
100	approximation prizes of $100	10,000
100	approximation prizes of $75	7,500
11,279	prizes, amounting to	522,500

Gen. G. T. Beauregard, of Louisiana, Gen. Jubal A. Early, of Virginia, Commissioners.

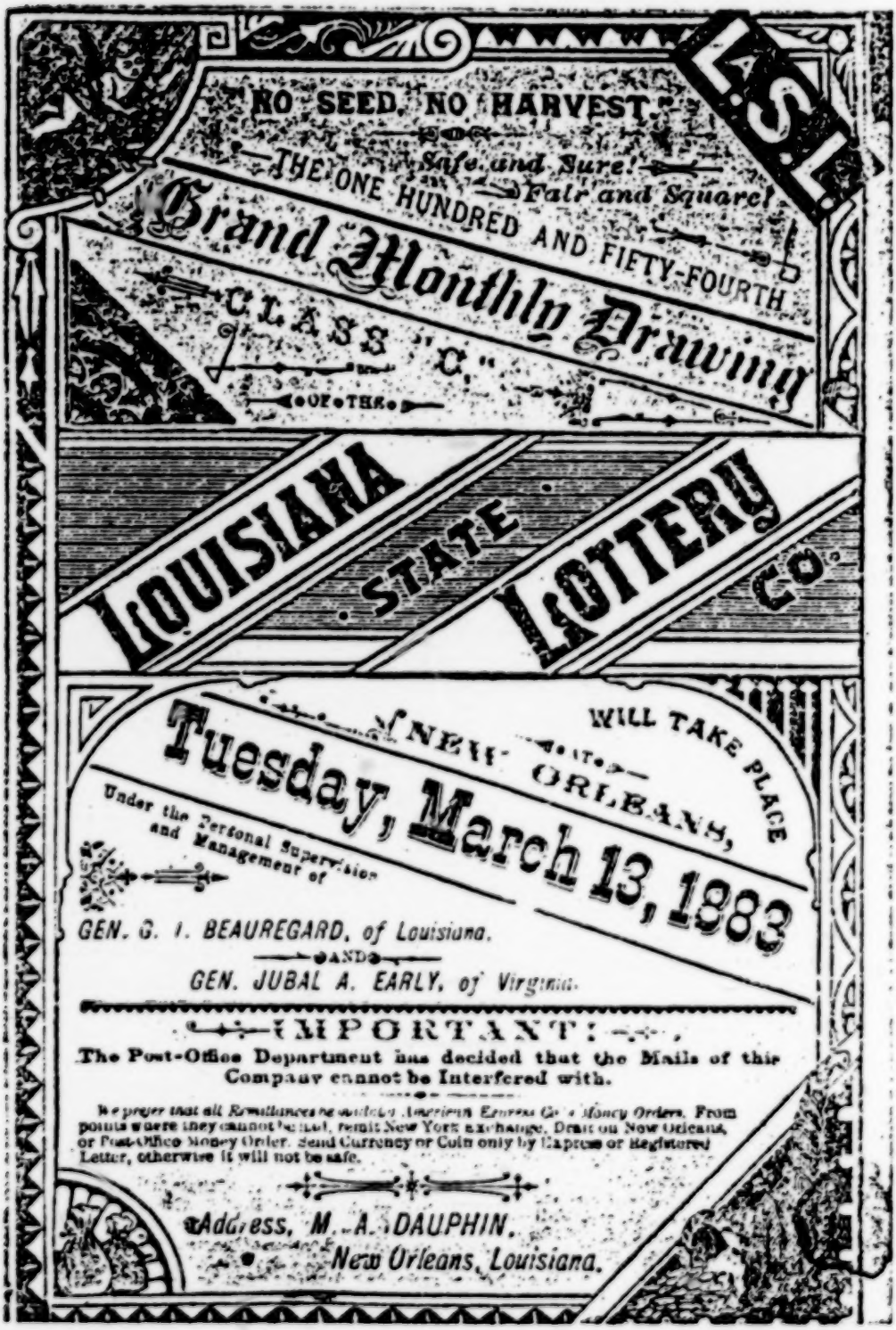
Applications for rates to clubs should only be made to the office of the company in New Orleans.

Write for circulars, or send orders to

M.A. DAUPHIN,
P.O. Box 692, New Orleans, La.

Or same person at No. 319 Broadway, New York

The following items are reproduced from G. Sullivan, *By Chance a Winner: The History of Lotteries* 53, 55 (1972):


L. S. L.
"NO SEED, NO HARVEST."
Safe and Sure!
THE ONE HUNDRED AND FIFTY-FOURTH
Fair and Square!
Grand Monthly Drawing
CLASS "C"
OF THE
LOUISIANA STATE LOTTERY CO.
WILL TAKE PLACE
IN THE CITY OF NEW ORLEANS,
Tuesday, March 13, 1883
Under the Personal Supervision and Management of
GEN. G. T. BEAUREGARD, of Louisiana.
AND
GEN. JUBAL A. EARLY, of Virginia.
IMPORTANT:
The Post-Office Department has decided that the Mails of this Company cannot be Interfered with.
We prefer that all Remittances be made by American Express Co's Money Orders. From points where they cannot be had, remit New York exchange. Draft on New Orleans, or Post-Office Money Order. Send Currency or Coin only by Express or Registered Letter, otherwise it will not be safe.
Address, M. A. DAUPHIN,
New Orleans, Louisiana.

HAVANA SCHEME.

Shelby College Lottery of the State of Kentucky.

HAMMETT & CO., United States Licensed Lottery Agents.

CLASS 238,

To be drawn in Covington, Ky., on Wednesday, May 31st, 1865.

Capital Prizes $40,000, $20,000, &c., amt'g to $318,750.

Brilliant Lottery on the Royal Havana Plan of Single No.'s.

SCHEME.

1	Prize of	$40.000	is	$40.000
1	Prize of	20.000	is	20.000
1	Prize of	10.000	are	20.000
1	Prize of	10.000		
1	Prize of	7.375	are	14.750
1	Prize of	7.375		
1	Prize of	5.000	are	20.000
1	Prize of	5.000		
1	Prize of	5.000		
1	Prize of	5.000		
4	Prizes of	3.000	are	12.000
11	Prizes of	2.000	are	22.000
25	Prizes of	1.000	are	25.000
50	Prizes of	500	are	25.000
100	Prizes of	200	are	20.000
5.000	Prizes of	20	are	100.000
5.200	Prizes	amounting to		$318.750

PLAN OF THE LOTTERY.—The numbers from 1 to 5200, corresponding with the numbers on the tickets, printed on separate slips of paper, are rolled up and numbered with small brass tubes, and placed in a Glass Wheel. The numbers of the different 200 full Prizes similarly printed and enumbered, are placed in another wheel. The number and prize drawn out are opened and exhibited to the audience, and registered by the Commissioners, the prize being placed against the number drawn. This operation is repeated until all the prizes are drawn out.

The 5000 prizes of $10 each are determined by the last figure of the number which draws the highest Capital Prize, ($40,000.) For example:—If the number drawing the $40,000 prize ends with figure 1, then those 5000 tickets having numbers ending in figure 1 will be entitled to $10. If the number ends with figure 7, then those tickets where the number ends in figure 3 will be entitled to $10, and so on to figure 0.

PACKAGES TEN DOLLARS.

Prizes payable in full without deduction.

☞ Remittances to Hammett & Co. can be made by mail with perfect safety; but if any person desires additional security, they can send a draft duly indorsed, (some where will be required) payable to our order—or have their letters registered, when it will be equivalent to a positive and safe delivery to us. ☞ Prizes of all registered Letters promptly secured, and information given by telegraph.

HAMMETT & CO., Box 2100, P. O., New York City.

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